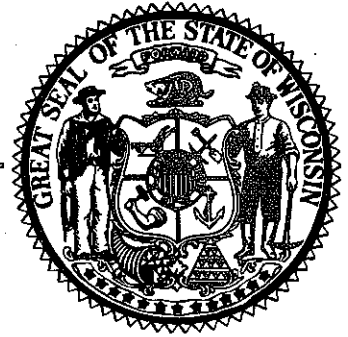


**FRED A. RISSE**  
President  
Wisconsin State Senate

August 26, 2009



Senator Jim Sullivan, Chair  
Senate Committee on Veterans and Military Affairs, Biotechnology, and Financial Institutions  
15 South, State Capitol  
Madison, WI 53702

Dear  Sullivan,

Thank you for holding a hearing on Assembly Bill 202, which is authored by Rep. David Cullen and which I am the lead Senate sponsor of this measure. I apologize for not being able to appear in person.

The purpose of this bipartisan bill is to repeal Article 6 of the Uniform Commercial Code. This recommendation was approved by the National Conference of Commissioners on Uniform State Laws and the American Law Institute in 1989. I am a Uniform Law Commissioner as is Rep. Cullen. To date, 45 states have repealed this outdated statute as have Puerto Rico and the U.S. Virgin Islands.


Bulk sales laws were originally drafted in response to a fraud perceived to be common around the early 1900's: a merchant would acquire his stock in trade on credit, then sell his entire inventory ("in bulk") and abscond with the proceeds, leaving creditors unpaid. Article 6 was drafted as a response to this "bulk sale risk."

Creditors no longer face the choice of extending unsecured credit or no credit at all. Retaining an interest in inventory to secure its price has become relatively simple and inexpensive under Article 9 of the UCC – which has been adopted in every state. If a bulk sale is fraudulent and the buyer is a party to the fraud, creditors have remedies under the Uniform Fraudulent Transfer Act.

Assembly Bill 202 was recommended unanimously for passage by the Assembly Committee on Jobs, the Economy and Small Business and was passed by the Assembly on a voice vote.

I appreciate your willingness to schedule this measure for a public hearing and I encourage the committee to look favorably upon this important legislation. Representatives of the State Bar will be present to answer any questions you or the committee members might have.

Most sincerely,

  
FRED A. RISSE  
President  
Wisconsin State Senate

FAR:tet

Cc: Senate Committee on Veterans and Military Affairs, Biotechnology, and Financial Institutions



# DAVID CULLEN

## STATE REPRESENTATIVE

### Written Testimony of Rep. David Cullen Regarding Assembly Bill 202

Senate Committee on Veterans and Military Affairs,  
Biotechnology, and Financial Institutions

August 26, 2009

Chairperson Sullivan and members of the committee, thank you for the opportunity to present to you today written testimony in support of Assembly Bill 202, relating to repealing Article VI of the Uniform Commercial Code, relating to the bulk transfer of inventory.

This suggested repeal was promulgated by the National Conference of Commissioners on Uniform State Laws in 1989 and has already been enacted in 45 other states, Puerto Rico and the U.S. Virgin Islands.

As a member of the Wisconsin Commission on Uniform State Laws, I can tell you that the introduction of this bill was a unanimous recommendation of the Wisconsin Commission, which is a bipartisan panel whose job it is to enact proposals following their introduction and approval by NCCUSL.

Bulk sales laws were originally drafted in response to a fraud perceived to be common around the turn of the 19<sup>th</sup> century: a merchant would acquire his stock in trade on credit, then sell his entire inventory ("in bulk") and abscond with the proceeds, leaving creditors unpaid.

Article VI of the U.C.C. was drafted as a response to this bulk sale risk. It imposes several duties on the buyer in bulk, including the duty to notify all creditors of the impending bulk transfer.

It also requires compliance even when there is no reason to believe that the seller is conducting a fraudulent transfer. Article VI imposes strict liability for noncompliance.

Failure to comply with the provisions of the article render the transfer ineffective, even when the buyer has complied in good faith.

However today, changes in the business and legal contexts in which sales are conducted have made regulation of bulk sales unnecessary.

Creditors are better able to make *informed decisions* about whether to extend credit. Changes in technology have enabled credit reporting services to provide fast, accurate, and more complete credit histories at relatively small cost.

Creditors also have greater opportunities to collect their debts. The adoption of state long-arm statutes and rules have greatly improved the possibility of obtaining personal jurisdiction over a debtor who flees to another state.

And creditors no longer face the choice of extending unsecured credit or no credit at all. Retaining an interest in inventory to secure its price has become relatively simple and inexpensive under Article 9 of the UCC – which has been adopted in every state.

If a bulk sale is fraudulent and the buyer is a party to the fraud, creditors have remedies under the Uniform Fraudulent Transfers Act, which has been adopted by 44 states, including Wisconsin.


Because there is no evidence in today's economy that fraudulent bulk sales occur often enough or create credit losses that are significant enough to require the regulation of bulk sales, the National Conference of Commissioners on Uniform State Laws, the American Law Institute, and the American Bar Association have all recommended repeal of Article 6 of the Uniform Commercial Code.

As I have previously mentioned, 45 other states have saw fit to do just that and it is time for Wisconsin to do the same.

It is my understanding that the State Bar of Wisconsin will be at the committee meeting today to answer any technical questions you may have regarding the bill.

Thank you again for the opportunity to present written testimony to you today in support of Assembly Bill 202.

# Business Law Section

 State Bar of Wisconsin

Wisconsin Lawyers. Expert Advisers. Serving You.

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**To:** Members of the Senate Committee on Veterans and Military Affairs,  
Biotechnology, and Financial Institutions

**From:** Business Law Section  
*State Bar of Wisconsin*

**Date:** August 26, 2009

**Re:** Support for Assembly Bill 202 – Repeal of Bulk Sales Law

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The Business Law Section of the State Bar of Wisconsin **strongly supports Assembly Bill 202** relating to the repeal of the bulk transfer provisions found in Article 6 of the Uniform Commercial Code (UCC) in order to provide equity to all parties - buyers, sellers and creditors of an affected business transaction. We especially want to thank Senator Risser and Representative Cullen for their help in forwarding this legislation.

## Background

The repeal of Article 6 was recommended in 1989 by the National Conference of Commissioners on Uniform State Laws and the American Law Institute; that recommendation was also supported at the national level by the American Bar Association. To date, 45 other jurisdictions have enacted the repeal without any noticeable dislocation of business practices.

Two other states (California and Virginia) - and the District of Columbia have also adopted a revised Article 6. Wisconsin should repeal Article 6 simply to modernize its business laws.

## How Did the Article 6 Notice Provision Originate?

The bulk transfer provision, Article 6 of the Uniform Commercial Code, states that notice must be given to creditors if a seller will be making a large sale of inventory (i.e., a bulk transfer). Decades ago the provision was originally enacted to catch the "fly by night" merchant who, usually in collusion with a buyer, would sell off large parts of inventory. Both would then disappear with the profits into the darkness of the night, leaving creditors unpaid and in the lurch. At that time, the provision was needed to provide a level of protection against the acts of the unscrupulous merchant. In today's economy it is not possible for either a bulk transferor or transferee to disappear across state lines to avoid creditors' actions. The long-arm jurisdiction the legislature long ago gave our courts allows suits on a debt to be filed in Wisconsin, notwithstanding the absence of the transferor or the transferee. Judgments can be enforced across state lines with relative ease.

## Why Should the Notice Provision Be Repealed Today?

The Business Law Section believes that the business environment and laws of today offer more remedies and protections than in the decades of yesteryear. Wisconsin is out of step with the 46 other states that have repealed this law due to the inconvenience it causes and its limited utility given other available protections. The notice provision is no longer necessary, because there are other protections

### State Bar of Wisconsin

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against loss and fraud available to suppliers of inventory that are available under today's laws. These include:

- Cheap and readily available credit reports.
- Security interest laws; a supplier can, for example, take a UCC Purchase Money Security Interest in all inventory supplied.
- The Uniform Fraudulent Transfer Act (Chapter 242 Wis. Stats.), which gives much greater protection against sales of inventory at less than fair value. This is the real, legitimate protection against transfers that are unfair to creditors, and it provides better remedies, without jeopardizing the legitimate transaction.
- Insolvency laws, which have within them avoidable transfer provisions for recovering assets which may have been wrongfully transferred, for the benefit of all creditors. Involuntary insolvency proceedings are available to creditors who believe they have been wronged.

#### **Why Article 6 Is No Longer Effective In Today's Economy?**

The bulk transfer statute places the burden of satisfying the seller's creditors upon the innocent buyer who has no past relationship to the seller's creditors. The costs of compliance and the risk of non-compliance are simply on the wrong person in purchase transactions.

In large acquisitions, the buyer must send notices, by registered or certified mail, to all the seller's creditors, often numbering in the thousands.

If the buyer doesn't comply completely, it risks having to pay twice for the goods. This occurs even if there is a technical violation of the statute, as the current law makes the transfer "ineffective" if there is non-compliance with the notice provisions. The bulk transfer statute is a trap for the unwary buyer who may not even be aware of its existence, particularly in small transactions, and especially because almost all other states have rescinded the law.

#### **If Article 6 Is Repealed What Protections Are In Place for Creditors?**

Article 6 is of limited utility to creditors in any event as it merely provides creditors with a 10 days notice that the sale will occur. Even with the notice creditors have no remedy under Article 6 and 10 days is insufficient time to commence a lawsuit and get a judgment, both of which are necessary for the creditor have any ability to attach and get paid out of the unsold assets or their proceeds. It is only the failure to give the notice that offers the creditors of the bulk seller any "remedy" – in that case the creditor can pursue the assets into the hands of the buyer, but the creditor would still have to have a judgment against the seller first. As stated above this remedy is unfair – it puts the risk of the seller's failure to pay its debts on the buyer –not on the creditor who sold him that inventory on credit without sufficient credit analysis or policing of the debt once it was created.

The real remedy for creditors is the Uniform Fraudulent Transfers Act or insolvency laws, which are unaffected by the repeal of Article 6. Creditors also could make use of Article 9 of the UCC to protect their interests. Security interests to secure inventory financing under Article 9 are available to all creditors, big and small. Such security interests can be taken in short term credit situations in goods delivered to retail establishments with relative ease. A security interest under Article 9 protects creditors much better than any remedy available under Article 6 because its lien continues on the goods transferred and on their proceeds, and the bulk buyer must account for them to the secured party. The insolvency laws (state receivership law and federal bankruptcy law) provide a means for creditors who believe they have been wronged to commence involuntary proceedings which could include the recovery of wrongfully transferred assets.

### **Summary**

Article 6 of the Uniform Commercial Code has become obsolete and burdensome. It does not balance equities between the parties to bulk transfers in a fair way. It offers only notice and no real legal remedy to a seller's unsecured creditors, who have other much more effective and efficient ways to protect themselves from fraud. There is no evidence that in today's economy, fraudulent bulk sales are frequent enough, or engender credit losses significant enough, to require regulation of all bulk sales, including the vast majority that are conducted in good faith. Simply put, the costs associated with keeping the statute is no longer justifiable or equitable in the context of today's business environment.

### **The Business Law Section urges your support of Assembly Bill 202.**

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For additional information contact Cale Battles, Government Relations Coordinator, at (608) 250-6077 or [cbattles@wisbar.org](mailto:cbattles@wisbar.org).

*The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.*

*The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.*